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May 4,2007

VIA FEDEX

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, Maryland 20743

Re: Reply Comments in Response to the Further Notice of Proposed Rulemaking in MB Docket No. 05-311

Dear Ms. Dortch:

Attached **for** filing *In **the Matter** of **Implementation** of **Section** 621(a)(1) of **the** **Cable** Communications **Policy Act** of 1984, as **amended by the Cable Television** **Consumer Protection and Competition Act** of 1992,* MB Docket No. 05-311, are an original and four (4) copies of the Reply Comments of the Burnsville/Eagan Telecommunications Commission; the City of Minneapolis, Minnesota; the North Metro Telecommunications Commission; the North Suburban Communications Commission; the City of Renton, Washington; and the South Washington County Telecommunications Commission in Response to the Further Notice of Proposed Rulemaking (the "Reply Comments").

I have also enclosed an additional copy of the Reply Comments. Please date-stamp that copy and return it to me in the enclosed postage-prepaid envelope.

Very truly yours,,

BRADLEY & GUZZETTA, LLC

Stephen J. Guzzetta

Attachment

No. of Copies rec'd 0+4
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†Also admitted in Wisconsin
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Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

REPLY COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE CITY OF MINNEAPOLIS, MINNESOTA; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; THE CITY OF RENTON, WASHINGTON; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

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May 4,2007

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SUMMARY

Section 632(d)(2) of the Cable Communications Policy Act of 1934, as amended, 47 U.S.C. § 552(d)(2) (the "Cable Act"), unambiguously preserves local authority (i) to unilaterally adopt customer service laws and regulations that exceed the customer service standards established by the Federal Communications Commission (the "FCC" or the "Commission"); and (ii) to agree to customer service standards that go beyond the FCC's standards. Neither the plain language of § 632(d)(2) nor the relevant legislative history suggests that the FCC can interfere with this reservation of authority. Consequently, any action the FCC might take to preempt or limit the ability of local franchising authorities to enact or agree to consumer protection requirements consistent with § 632(d)(2) would be arbitrary and capricious and would conflict with the Communications Act of 1934.

Both AT&T Inc. and Verizon ask the FCC to write new requirements into § 632(d)(2). Specifically, the companies have requested that the Commission declare that local customer service requirements must be "reasonable" and cannot rise to the level of an unreasonable refusal to award an additional competitive franchise for purposes of § 621(a)(1) of the Cable Act, 47 U.S.C. § 541(a)(1). The companies also argue that they should be subject only to uniform customer service standards, and that local requirements must be limited to the subjects delineated in § 632(b) of the Cable Act, 47 U.S.C. § 552(b). Such limitations, however, cannot be supported by the plain language of § 632(d)(2), which provides local franchising authorities with broad latitude to enact or agree to ***local*** customer service rules, laws and requirements they deem appropriate to protect consumers and to address quality of service issues. The Commission must respect and give complete effect to Congress' intent, as expressed **in** the text of § 632(d)(2). To do otherwise would ignore established tenets of statutory construction.

AT&T Inc. and Verizon also posit that § 706 of the Telecommunications Act of 1996 can be used to preempt or limit local customer service authority preserved by § 632(d)(2). The general authority given to the Commission in § 706, however, cannot trump the specific reservation of power in § 632(d)(2). Moreover, the predicate for FCC action under § 706 has not been satisfied because the Commission has consistently concluded that advanced telecommunications capability is 'beingmade available to the public in a reasonable and timely manner. The Commission therefore cannot rely on § 706 to restrict or eliminate local consumer protection authority protected by § 632.

In addition, the FCC must refrain from immediately applying the ***Report*** *and* ***Order*** to incumbent cable operators because doing so would be both unfair and unnecessary. Indeed, the Commission's underlying concerns in adopting the ***Report*** *and* ***Order*** are entirely inapplicable to incumbent cable operators that have already received franchises and are providing service pursuant to agreements they have assented to voluntarily and intelligently. These existing franchise agreements were carefully negotiated by the parties and were based upon settled understandings of the law and the parties' long-standing course ***of*** dealing. The agreements provide for all manner of responsibilities, obligations and benefits, including provisions relating to public, educational and governmental access speech and compensation for the use of scarce and valuable public rights-of-way. Eviscerating existing franchise agreements would raise Constitutional problems under both the First and Fifth Amendments. Under settled law, the FCC must avoid causing Constitutional issues whenever possible. The FCC should also clarify that its discussion of mixed-use networks does not affect local government police powers, franchising authority or right-of-way management authority.

Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC **20554**

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of **1984** as amended by the Cable Television Consumer Protection and Competition Act of 1992	)))))	MB Docket No. **05-311**

REPLY COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE CITY OF MINNEAPOLIS, MINNESOTA; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; THE CITY OF RENTON, WASHINGTON; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

The City of Minneapolis, Minnesota, the City of Renton, Washington and the following municipal joint powers commissions respectfully submit reply comments in the above-captioned proceeding: the Burnsville/Eagan Telecommunications Commission (a municipal joint powers commission consisting of the cities of Bumsville and Eagan, Minnesota); the North Metro Telecommunications Commission (a municipal joint powers commission consisting of the cities **of** Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park, Minnesota); the North Suburban Communications Commission **(a** municipal joint powers commission consisting of the cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North *Oaks,* Roseville, St. Anthony and Shoreview, Minnesota); and the South Washington County Telecommunications Commission (a municipal joint powers commission consisting of the municipalities of Woodbury, Cottage Grove, Newport, Grey Cloud

Island Township and St. Paul Park, Minnesota) (collectively, the "LFAs").[1] Although numerous telephone companies and cable operators filed comments in response to the Further Notice of Proposed Rulemaking issued by the Federal Communications Commission (the "FCC" or the "Commission")? these reply comments will primarily focus on a number of claims made by Verizon,[3] AT&T Inc. ("AT&T") and the National Cable & Telecommunications Association (the "NCTA")!

I. INTRODUCTION.

The Verizon Comments and the AT&T Comments in this proceeding effectively ask the FCC to re-write Section 632 of the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. § 552 (the "Cable Act"), and to limit state and local authority that was specifically preserved by Congress. Both the plain language of § 632(d)(2) and Congressional intent are

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[1] With the exception of the South Washington County Telecommunications Commission, the member cities of the various joint powers commissions award cable franchises to applicants. The joint powers commissions are generally responsible for enforcing and administering their member cities' cable franchises, and for negotiating franchise renewals. The South Washington County Telecommunications Commission, however, is also empowered to award cable franchises on behalf of its member cities.

[2] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, MB Docket No. 05-311 (Rel. March 5,2007) (the "*Report and Order*" and the "*FNPRM*").

[3] The term "Verizon" in these Reply Comments refers to the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

[4] *See* Comments of the National Cable & Telecommunications Association, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (April 20,2007) (the "NCTA Comments"), Comments of Verizon, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1'992*,Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (April 20,2007) (the "Verizon Comments"), and Comments of AT&T Inc., *In the Matter of Implementation of Section!621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (April 20,2007) (the "AT&T Comments").

clear with respect to consumer protection – local governments may unilaterally, or by agreement with cable operators, adopt customer service requirements and regulations that are stricter than the FCC's minimum standards or that address subjects not addressed in the federal standards. There is no room for any Commission interpretation or action, and § 632(d)(2) must be given its full and complete meaning. In this regard, § 621(a)(1) of the Cable Act, 47 U.S.C. § 541(a)(1), cannot be construed to limit or preempt the lawful authority unambiguously maintained by § 632(d)(2). Indeed, to do so would violate fundamental tenets of statutory construction by making § 632(d)(2) mere surplusage and ignoring the plain meaning of Congress' words. Accordingly, any action the FCC might take to preempt or limit the LFAs' ability to enact or agree to more stringent consumer protection requirements or requirements that deal with subject matter not covered by the Commission's standards would be arbitrary and capricious.[5]

The NCTA would have the Commission apply the ***Report and Order,*** and the rules, findings and pronouncements contained therein, to incumbent cable operators immediately.[6] Such an approach, however, would be both unfair and unnecessary. First, the apparent rationale underlying the ***Report and Order*** – removing barriers to market entry – is inapplicable to incumbent cable operators because they have already received a franchise and are providing service. In fact, the cable industry has flourished under local franchising. Second, incumbent cable operators and local franchising authorities carefully negotiated the compensation to be received for the use of scarce and valuable public rights-of-way. The Commission should not ***ex postfacto*** upset the delicate balance of benefits and obligations agreed to by the parties, particularly since the cable industry knowingly and intelligently assented to specific

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[5] ***See,*** *e.g.*, ***People of the State of*** *California* ***v. FCC,*** 905 F.2d 1217, 1230 (9th Cir. 1990); ***Home Box Office, Inc. v. FCC,*** 567 F.2d 9, 36 (D.C. Cir. 1977).

[6] See the NCTA Comments at 7-19.

consideration based on settled understandings of the law. Vitiating important compensation provisions in franchise agreements would ignore the parties' longstanding course of dealing and deprive local franchising authorities of the benefit of their bargain. Finally, if the Commission does apply its rules to incumbent cable operators immediately, and local franchising authorities lose significant right-of-way compensation, First Amendment and Fifth Amendment considerations will arise. The FCC should avoid talung actions that will give rise to Constitutional problems.[7]

Both the NCTA Comments and the Verizon Comments apparently approve of the FCC's conclusions concerning "mixed-use'' networks, and the NCTA argues that ¶¶ 121-122 of the ***Report and Order*** should apply to all cable operators without delay.[8] Incumbent cable operators, however, are already providing cable service, so the concerns articulated by the FCC in the ***Report and Order*** are inapposite. Moreover, there **is** no record in this proceeding for preempting the fundamental right-of-way management, franchising and police powers of local governments, which may address non-cable service providers and are rooted in authority outside Title VI of the Communications Act of 1934 (*i.e.*, state and local law).

II. THE FCC MUST GIVE EFFECT TO THE PLAIN MEANING OF § 632(D)(2) OF THE CABLE ACT AND THEREFORE CANNOT PREEMF'T OR LIMIT LOCAL CONSUMER PROTECTION REQUIREMENTS THAT EXCEED THE FCC'S STANDARDS OR THAT ADDRESS SUBJECTS NOT ADDRESSED BY THE FEDERAL STANDARDS.

A. Section 632(d)(2) of the Cable Act, 47 U.S.C. § 552(d)(2), Does Not Provide the FCC with Any Preemptive Power Over Local Customer Service Requirements. Laws and Regulations.

Section 632(d)(2) of the Cable Act, 47 U.S.C. § 552(d)(2), expressly preserves local authority: (i) to adopt unilaterally customer service laws and regulations that exceed the FCC's

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[7] See, *e.g., I.N.S. v. St. Cyr,* 533 U.S. 289, 299-300 (2001).

[8] *See* the NCTA Comments at 19-20 and the Verizon Comments at 7

customer service standards; and (ii) to agree to customer service standards that go beyond the minimum federal standards established by the Commission. Notwithstanding this reservation of power, AT&T and Verizon apparently believe that the Commission may limit or preempt the very standards protected by § 632(d)(2) pursuant to §§ 621(a)(1) and 636(c) of the Cable Act, 47 U.S.C. §§ 541(a)(1) and 556(c).[9] 'Thereis, however, no language in §§ 621(a)(1) or 636(c) expressly conferring upon the FCC jurisdiction over state and local consumer protection laws, regulations and requirements. In fact, the legislative history of the Cable Act makes clear that Congress intended to maintain (and encourage) such laws, regulations and requirements to guard against poor customer service. For instance, H.R. Rep. No. 102-628 states that § 632(d)(2) "preserves local authority to establish and enforce any municipal law or regulation, or any state law, concerning customer requirements that are more stringent than, or address matters not addressed by, the standards established by the FCC . . ."[10] Moreover, § 636(c) is entirely irrelevant because there is no conflict between federal law and local customer service

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[9] ***See,*** *e.g.*, the Verizon Comments at 1-4, and the AT&T Comments at 5-7.

[10] H.R. Rep. No. 102-628, 102nd Cong., 2d Sess. at 106 (1992). See ***also id.*** at 36, wherein the House Committee on Energy and Commerce stated "[w]hile the Committee commends the cable industry for taking steps to improve the quality of customer service, the Committee questions whether the [NCTA] guidelines are stringent enough and whether a self-policing mechanism can be successful in addressing the serious concerns of customers about the cable industry's customer service practices." The House Conference Report, which adopted Section 7 of the House amendment, stated:

> franchising authorities and cable operators are permitted to agree to customer service requirements, even if those requirements may result in the establishment and enforcement of customer service standards more stringent than the standards established by the FCC under section 632(b). Finally, this subsection preserves local authority to establish and enforce any municipal law or regulation, or any state law, Concerning customer service requirements that are more stringent than, or address matters not addressed by, the standards established by the FCC . . .

H. Conf. Rep. No. 102-862, 102nd Cong., 2d Sess. at 78, ***reprinted*** *in* 1992 U.S.C.C.A.N 1231, 1261 (1992).

requirements that are stricter or more comprehensive than the FCC's standards since the Cable Act authorizes those very requirements. Accordingly, it is evident that Congress has not explicitly or implicitly authorized the Commission to preempt the types of local consumer protection laws and regulations specified in § 632(d)(2).

It is settled law that the FCC can only preempt local customer service laws and regulations if Congress has clearly authorized it to do so. **As** the Supreme Court has pointed out in ***Louisiana Public Service Comm'n v. FCC***:[11]

> a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority . . . . First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state [and by implication its political subdivisions], unless and until Congress confers power on it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of authority granted by Congress to the agency."

Section 632(d)(2) and § 621(a)(1) gi-ant the FCC absolutely no power to preempt or otherwise limit local consumer protection requirements. To the contrary, the plain language of § 632(d)(2) bars the FCC from vitiating such requirements. Accordingly, the Commission may not lawfully promulgate regulations or orders which preempt or circumscribe local customer service standards that are more stringent than or address different issues than the FCC's rules. If the Commission was to adopt such regulations, they would be arbitrary and capricious.[13]

Because § 632(d)(2) and § 621(a)(1) do not include any express authority for preempting local customer service laws that exceed the FCC's standards or address subjects not covered by

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[11] 476 **U.S.** 355 (1986).
[12] *Id.* at 374-75.
[13] ***See Motion Picture Ass'n of America v. FCC***, 309 F.3d 796, 801 (D.C. Cir. 2002) (holding that an agency's interpretation of a statute is not entitled to deference absent a delegation of authority from Congress).

those standards, AT&T and Verizon must be interpreting those provisions in a way which provides the FCC with implied preemption authority. Such an interpretation, however, is not supportable. First, it is a fundamental tenet of statutory construction that the presence of an express preemption provision in one section of a statute is a reason not to imply preemption authority in a section of the same statute lacking an express preemption provision because "Congress knew how to pre-empt in this very statute when it wanted to."[14] The Communications Act of 1934 is replete with statutory provisions which provide the Commission with preemptive power.[15] Sections 632(d)(2) and 621(a)(1), however, are not such provisions. Thus, implying preemptive authority from § 632(d)(2) or § 621(a)(1) is inappropriate.

Moreover, given the legislative history of the Cable Act and the plain language of § 632(d)(2), which preserve local customer service authority, Congress could not have intended to authorize the FCC to preempt or restrict local requirements that exceed the FCC's minimum standards or address issues not otherwise addressed by the minimum federal standards.[16] Indeed, any Congressional intent to displace traditional areas of state and local authority (*e.g.*, consumer

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[14] ***Cable Television Assh of New York, Inc. v. Finneran,*** 954 F.2d 91, 102 (2nd Cir. 1992) (citing ***Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams,*** 899 F.2d 1315, 1319 (2nd Cir.1990)).

[15] ***See, e.g.***, 47 U.S.C. § 253, which provides that, "[i]f, after notice and an opportunity for comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." ***See also,*** 47 U.S.C. § 332(c)(7)(B)(v) (providing that any "person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief"), 47 U.S.C. § 252(e)(5) ("If a State commission fails to act to carry out its responsibility under this section ...then the Commission shall issue an order preempting the State commission's jurisdiction ...."**)** and 47 U.S.C. § 276(c) ("To the extent that any State requirements are inconsistent with the Commission's regulation the Commission's regulations on such matters shall preempt such State requirements.").

[16] ***See, e.g., Nashoba Communications, L.P. v. Town of Danvers,*** 893 F.2d 435, 440 (1st Cir. 1990) (stating "[i]t would be inconsistent with the legislative scheme to imply additional federal remedies which Congress apparently did not intend to supply").

protection) through the enactment of the Cable Act would need to be "clear and manifest" and unmistakable.[17] There is no clear and unmistakable language in § 632 **or** § 621(a) which suggests that Congress intended to imbue the Commission with any power to preempt local customer service standards that are stricter than or different from the FCC's standards. Thus, the FCC cannot lawfully rely on § 632(d)(2) or § 621(a)(1) for preemptive authority and may not utilize that provision to confer power upon itself.[18]

B. The Commission Cannot Impose a "Reasonableness" Requirement on Local Customer Service Requirements, Rules. Standards and Regulations.

Verizon asserts that any customer service rules or requirements imposed by local franchising authorities, such as the LFAs, must be "reasonable."[19] There is, however, no "reasonableness" requirement in the text of §§ 632(a)(1) or 632(d) of the Cable Act, 47 U.S.C. §§ 552(a)(1) and 552(d). In this regard, § 632(a)(1) of the Cable Act clearly states local franchising authorities are explicitly permitted to "establish and enforce . . . customer service requirements of the cable operator. . ."[20] without any reference to "reasonable" standards. If Congress wished to limit local customer service requirements to those that are "reasonable," it could have done so at the same time it added language to § 621(a)(1) of the Cable Act which states that local franchising authorities cannot unreasonably refuse to award an additional competitive franchise to an applicant. In the case of § 632(a)(1), Congress did not adopt such a

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[17] ***See Gregory v. Ashcrofr,*** 501 U.S. 452,460-61 (1991). ***See also Cable Television Ass'n of New York, Inc. v. Finnerun,*** 954 F.2d 91, 100 (2nd Cir. 1992); ***City of Dallas v. FCC,*** 165 F.3d 341, 347-48 (5th Cir. 1999) (stating that ***Gregory vs. Ashcrofr*** prohibits implied preemption, and that a clear statement of preemptive intent **is** necessary to displace traditional state and local powers).

[18] ***Louisiana Public Service Comm'n***, 476 U.S. at 374-75.

[19] ***See, e.g.,*** the Verizon Comments at 1-3 and 5.

[20] ***See, e.g.,*** 47 U.S.C. § 552(a)(1).

requirement, and the FCC may not write one into the statute approximately fifteen years after the fact.

Like § 632(a)(1), § 632(d) does not mandate that local customer service laws and agreements must be "reasonable." Indeed, § 632(d)(1) states that "[n]othing in this title shall be construed to prohibit any. . . franchising authority from enacting or enforcing ***any*** consumer protection law . . . to the extent not specifically preempted by this title."[21] Section 632(d)(2) likewise provides that:

> [n]othing in this title: shall be construed to prevent the establishment or enforcement of ***any municipal law or regulation*** . . . concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the (Commission under this section.[22]

The use of the word "any" in both § 632(d)(1) and § 632(d)(2) makes clear that Congress did not attach a "reasonableness" requirement to local franchising authorities' consumer protection authority under the Cable Act and state and local law. Because §§ 632(a)(1) and 632(d)(1)-(d)(2) are unambiguous on their face, the FCC has no power to interpret those provisions; they must be given their plain meaning.[23]

Although there is no "reasonableness" standard for consumer protection standards in § 632 **(or** elsewhere in the Cable Act), it should be noted that any valid issues concerning the "reasonableness" of local consumer protection requirements can and should be dealt with through the franchise negotiation process and/or the local legislative process. The legislative process, for example, provides cable: operators with an ample opportunity for input into the

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[21] 47 U.S.C. § 552(d)(1) (Emphasis added).
[22] 47 U.S.C. § 552(d)(2) (Emphasis added).
[23] *See, e.g.,* ***Greenwood v. United States,*** 350 U.S. 366, 374 (1956).

establishment of standards and holds local government officials accountable for their actions.[24] If a local franchising authority violates any substantive or procedural requirements under state and/or local law in connection with the adoption of customer service laws or regulations, a cable operator may seek recourse in a court of competent jurisdiction. To the extent a cable operator agrees to particular customer service requirements during the course of franchise negotiations, those requirements would be ***per se*** .reasonable because they were assented to knowingly, intelligently and voluntarily.

C. Section 621(a)(1) of the Cable Act. 47 U.S.C. § 541(a)(1), Cannot be Construed to Limit or Preempt the Authority Preserved by § 632(d)(2).

Both AT&T and Verizon suggest that customer service laws, rules and requirements adopted by local governments cannot function as a bamer to entry that would result in an unreasonable refusal to award a competitive franchise.[25] Verizon, for example, states that "customer service requirements must be reasonable, and not rise to the level of an unreasonable refusal to award a competitive franchise."" AT&T, in turn, recommends that the FCC adopt rules to prevent local franchising authorities from adopting "quality of service standards and reporting requirements, which can be so burdensome to a new entrant as to constitute a barrier to entry."[27] There is, however, no "barrier to entry" language in § 632(a)(1) or § 632(d), and applying the § 621(a)(1) prohibition on unreasonable refusals to award additional competitive franchises would impermissibly re-write the clear and unambiguous text of § 632(d)(2), and

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[24] *See* ***Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992: Consumer Protection and Customer*** Service, 8 FCC Rcd 2892,2896 (1993) ("franchise authorities will not be able to enact consumer protection or customer service laws or regulations without following the procedural requirements attendant to the political process. Cable operators will thus have ample opportunity to present their views and all relevant information to the local government and the public . . .").

[25] See, *e.g.*, the Verizon Comments at 1-2 and 5 and the AT&T Comment at 5 and 7.

[26] Verizon Comments at 5.

[27] AT&T Comments at 5 and 7.

frustrate Congress' goal of empowering local governments to address cable operators' customer service deficiencies.

Although creative, Verizon's and AT&T's proposed application of § 621(a)(1) to § 632 cannot be countenanced. When Congress enacted § 632(d)(2) it did not state that local governments could adopt customer service laws and requirements that are stricter than the FCC's rules or that address matters not otherwise addressed in the federal standards promulgated pursuant to § 632(b), 47 U.S.C. § 552(b), only if those laws or requirements do not constitute an unreasonable refusal to award an additional competitive franchise. To the contrary, local authority preserved under § 632(d)(2) is unfettered by Title VI of the Communications Act of 1934, as amended. Indeed, the language of § 632(d)(2) is crystal clear on this point:

> *[n]othing in this title [VI]* shall be construed to prevent the establishment or enforcement of any municipal law or regulation . . . concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.[28]

Thus, § 621(a)(1), as a part of Title VI, cannot be invoked to prevent the LFAs and other franchising authorities from establishing the types of customer service requirements and/or laws preserved by § 632(d)(2). Doing so would conflict with the plain text of the statute and would convert all or part of § 632(d)(2) into mere surplusage, in contravention of established canons of statutory construction.[29]

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[28] 47 U.S.C. § 552(d)(2) (Emphasis added).

[29] *See, e.g., United States v. Blasius*, 397 F.2d 203, 207 n. 9 (2nd Cir. 1968). *See also Aluminum Co. of America v. Dept. of Treasury*, 522 F.2d 1120, 1126-1127 (6th Cir. 1975); *Bird* v. *United States*, 187 U.S. 118, 124 (1902); *United States v. Powers*, 307 **U.S.** 214,217 (1939); *United States v. Shaver*, 506 F.2d 699 (4th Cir. 1974); and *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672,689 (D.C. Cir. 1973).

Like all federal agencies,,the FCC must give effect to the plain meaning of § 632(d)(2).[30] This means the narrow limitation on local authority in § 621(a)(1) cannot be read into § 632(d)(2). Indeed, to do so would violate the plain meaning rule. Because § 632(d)(2) is unambiguous on its face, there is no need to resort to the legislative history of the Cable Act. However, even if the relevant legislative history is considered, it is apparent that Congress wanted to ensure that local franchising authorities would have the ability to protect consumers against unfair and unscrupulous cable operator practices?' **As** importantly, there is absolutely no evidence in the legislative history to suggest that Congress ever intended to make local consumer protection authority subordinate to market entry considerations. In fact, the opposite conclusion must be drawn because when Congress included the "unreasonable refusal" language in § 621(a)(1) **as** part of the 1992 amendments to the Cable Act, it did not include that same language in the 1992 amendment!; to § 632 (which amendments include what is now § 632(d)(2)). Under the principle of ***expressio unius est exclusio alterius***, Congress is deemed to have excluded the "unreasonable refusal" limitation from § 632 when it explicitly included that very language in § 621(a)(1).[32]

The AT&T Comments and the Verizon Comments also seem to suggest that local franchising authorities should be barred from conditioning the grant of a franchise upon a cable

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[30] ***See, e.g., Chevron, U.S.., Inc. v. Nat'l Resources Defense Council, Inc.***, 467 U.S. 837 (1984) (federal administrative agency must give effect to the unambiguously expressed intent of Congress); ***Southern Co. v. FCC***, 293 F.3d. 1338, 1345(11th Cir. 2002) (holding that FCC action must be "struck down" to the extent it "fails to effect the unambiguous intent of Congress"); and ***Apex Express Corp. v. The Wise Co.***, 190F.3d 624 (4th Cir. 1999) (stating that an agency must give effect to the unambiguously expressed intent of Congress).

[31] See, *e.g.*, *supra* note 10.

[32] ***See, e.g., Gotkin*** v. ***Miller,*** 379 F.Supp. 859 (E.D.N.Y. 1974); ***Russello v. United States***, 464 U.S. 16, 23 (1983) (stating that when Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is to be presumed that Congress acts intentionally and purposely in doing so); and ***Duncan v. Walker, 533*** U.S. 167 (2001).

operator's agreement to customer service requirements that the operator believes are a "barrier to entry."[33] In other words, the telephone industry apparently believes local franchising authorities should not be permitted to negotiate customer service standards which exceed minimum federal standards because doing so would constitute an unreasonable refusal to award a competitive franchise for purposes of § 621(a)(1). This issue, however, is a red herring, as new entrants have significant bargaining power during franchise negotiations, and cannot be forced to agree to specific customer service provisions as part of contract discussions.[34] Moreover, § 621(a)(1), by its terms, is not applicable to incumbent cable operators. In any event, the FCC cannot grant the relief requested by Verizon and AT&T because § 632(d)(2) of the Cable Act specifically preserves the ability of local franchising authorities and cable operators to agree to customer service requirements that exceed the FCC's minimum standards. Furthermore, any rule limiting or preventing local government authority to negotiate customer service requirements that are more stringent than the federal customer service rules would run afoul of Supreme Court precedent which holds that local governments cannot be forced to bargain away their police powers.[35]

D. Section 706 of the Telecommunications Act of 1996 is Not a Basis for Preempting or Limiting Local Authority Preserved by § 632(d)(2) of the Cable Act.

Verizon and AT&T claim that the FCC may rely on § 706 of the Telecommunications Act of 1996[36] to preempt local customer service requirements that purportedly threaten the

[33] *See, e.g.,* the Verizon Comments at 1-3 and 5 and the AT&T Comments at 5 and 7.
[34] It should be noted that, outside the franchise negotiation process, local franchising authorities may unilaterally impose customer service requirements by law and/or regulation.
[35] *See, e.g., Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); and *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983).
[36] Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104.

reasonable and timely deployment of advanced telecommunications capability.[37] Section 706, however, does not provide the FCC with any explicit preemptive authority. Section 632(d)(2) of the Cable Act, on the other hand, expressly preserves local consumer protection authority. It is therefore evident that Congress, never intended § **706** to eviscerate the local police powers protected by § 632(d)(2). Consequently, the adoption of rules preempting or impairing local consumer protection requirements would be prohibited by *Gregory v. Ashcroft*.[38]

Because § 706 is very general in nature and does not contain any preemptive authority, the FCC must construe that provision in a way that respects and upholds the specific reservation of authority Congress established in § 632(d)(2).[39] In other words, the FCC must give effect to the plain meaning of § 632(d)(2) or resolve any conflict between § 706 and § 632(d)(2) in favor of the explicit authority and rules preserved by § 632(d)(2). If § 706 can be lawfully construed to preempt local customer service requirements, it would effectively render § 632(d)(2) meaningless, given that a cable operator could allege that any sort of municipal regulation is impeding the deployment of advanced telecommunications capabilities. Such a result must be avoided in light of the "presumption against construing a statute as containing superfluous or meaningless words. . ."[40]

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[37] **See** the Verizon Comments at 6 and 8 and the AT&T Comments at 1 and 7.

[38] 501 U.S. 452, 460-61 (1991).

[39] *See, e.g., Palm Beach Canvasszng Board v. Harris,* 772 So.2d 1220, 1243 (Fla. 2000); *Busic v. United States,* 446 U.S. 398,406 (1980) (stating that a specific statute controls over a general statute regardless of their temporal sequence); and *Bulova Watch* Co. *v. United States,* 365 U.S. 753,758 (1961).

[40] *United States v. Blasius*, 397 F.2d *203,207* n. 9 (2nd Cir. 1968). **See** *also Aluminum Co. of America v Dept. of Treasury,* 522 F.2d 1120, 1126-1127 (6th Cir. 1975); *Bird v. United States,* 187 U.S. 118, 124 (1902); *United States v. Powers, 307* U.S. 214,217 (1939); *United States v. Shaver, 506* F.2d 699 (4th Cir. 1974); and *National Petroleum Refiners Ass'n v. FTC,* 482 F.2d 672,689 (D.C. Cir. 1973).

It should also be emphasized that the predicate for Commission action under § 706 has not been satisfied. The FCC may only act pursuant to § 706 if it determines that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion.[41] In its most recent report to Congress on the availability of advanced telecommunications capability in the United States, however, the FCC concluded that "the overall goal of § 706 is being met, and that advanced telecommunications capability is indeed being deployed on a reasonable anal timely basis to all Americans."[42] The FCC is therefore barred from utilizing § 706 to take any action limiting or preempting local customer service laws, regulations and requirements preserved by § 632(d)(2) of the Cable Act.

E. The Authority Preserved in § 632(d)(2) is Not Limited to "Cable Service" Rules.

Verizon asserts that customer service rules imposed by local franchising authorities must be limited to cable services.[43] Section 632, however, contains no such limitation. For instance, § 632(a)(1) specifies that a franchising authority may establish and enforce "customer service requirements of the cable operator. .." Similarly, § 632(d)(1) refers to "any consumer protection law," while § 632(d)(2) references "customer service requirements" agreed to by a franchising authority and a cable operator and "any municipal law or regulation . . . concerning customer service that imposes custoimer service requirements . . ."[44] Thus, there is absolutely no language in § 632 which states local governments may only agree to or enact "cable service" customer service requirements. Accordingly, the FCC cannot adopt such a restriction.

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[41] Telecommunications Act of 1996, § 706(b), Pub. L. 104-104.

[42] *See Availability of Advanced Telecommunications Capability in the United States,* Fourth Report to Congress, 19 FCC Rcd 20540 (2004).

[43] *See* Verizon Comments at 1-3.

[44] 47 U.S.C. §§ 552(d)(1)-(d)(2).

The fact that § 632(a)(1) arid § 632(d)(2) include the term "cable operator" does not function to constrain consumer protection authority local franchising authorities possess under state and local law to "cable service." Pursuant to § 602(5) of the Cable Act, a "cable operator" is:

> any person or group of persons **(A)** who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such cable system . . .[45]

A "cable system'' is defined, in relevant part, as "a facility, consisting of a set of closed transmission paths and associatedl signal generation, reception and control equipment that is designed to provide cable service which includes video programming . . ."[46] These two definitions, read together, *make* clear that a cable operator is not limited by the Cable Act to providing only cable service (assuming it possesses the authorizations needed to offer additional services). In this regard, the definition of "cable operator" merely states that a person must be providing cable service over a cable system or controlling a cable system; it does not state that a person must *only* be providing cable service to qualify as a cable operator. Stated differently, a person does not cease being a cable operator because it provides more than cable service over a cable system. Moreover, the concept of a cable system is not limited to a network that is exclusively used to deliver cable service.[47] Rather, a cable system is a closed network that is

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[45] 47 U.S.C. § 522(5).

[46] *See* § 602(7) of the Cable Act, 47 U.S.C. § 522(7).

[41] *See, e.g.,* H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. at 27, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4664 (1984) ("many cable facilities, especially those built in recent years, have been constructed with the capability of providing "two-way" services, such as the transmission of voice and data traffic . . .). *See also id.* at 29, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4666 ("H.R. 4103 maintains existing regulatory authority over all other communications services offered by a cable system . . .") and 44, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681 ("[t]he term 'cable

merely designed to provide cable service, but may also be utilized to furnish additional services (assuming necessary state and local authorizations are obtained).

These conclusions are compelled by the clear language of the Cable Act. Section 621(b)(3), 47 U.S.C. § 541(b)(3), for example, anticipates that a cable operator can provide telecommunications services, while § 624(b)(1), 47 U.S.C. § 544(b)(1), indicates that cable systems can be used to furnish information services.[48] The FCC must give effect to the unambiguously expressed intent of Congress as reflected in these statutory provisions.[49] Consequently, §632 cannot possibly be interpreted to limit local consumer protection authority to cable service. Instead, any such limitation must be rooted **in** state law.

F. "Disparate" Customer Service Requirements are Contemplated bv § 632 and Cannot be Preempted.

In its comments, Verizon states that "disparate customer service regulations make little sense in the context of providers that offer video services over regional or national networks . . ."[50] AT&T similarly claims that local customer service requirements "would pose huge challenges for new entrants . . . whose network and operations support systems are deployed on a regional basis."[51] Neither company, however, provides any substantial or credible support for its allegation. More importantly, the facts actually contradict the companies' claims.

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system' **is** not limited to a facility that provides cable service which includes video programming.").

[48] In these cases, a cable operator must, of course, obtain necessary state and local authorizations before providing service.

[49] *See, e.g., Chevron, U.S., Inc. v. Nat'l* ***Resources*** *Defense Council, Inc.*, 467 U.S. 837 (1984) (federal administrative agency must give effect to the unambiguously expressed intent of Congress); *Southern* Co. *v. FCC*, 293 F.3d. 1338, 1345 (1Ith Cir. 2002) (holding that FCC action must be "struck down" to the extent it "fails to give effect to the unambiguous intent of Congress"); and *Apex Express Corp. v. The Wise Co.*, 190 F.3d 624 (4th Cir. 1999) (stating that an agency must give effect to the unambiguously expressed intent of Congress).

[50] *See* the Verizon Comments at 3.

[51] *See* the AT&T Comments at 5.

Specifically, it is evident that regional cable systems currently operated by incumbent cable operators, such as Comcast, have not been overly burdened by the establishment and continued enforcement of local customer service requirements that have been in effect for years. Indeed, the cable industry has flourished while complying with local customer service rules, standards and laws.[52] Consequently, the adoption of any rules based on the companies' unsupported and self-serving statements would be arbitrary and capricious.[53]

It should also be noted that § 632 undoubtedly contemplates that *local* customer service requirements will be adopted or agreed to by *local* franchising authorities. In this regard, both § 632(a)(1) and § 632(d) permit local governments to adopt consumer protection laws, regulations and requirements – without any uniformity or general applicability requirement.[54] In enacting what is now § 632(d), Congress made clear that "franchising authorities and cable operators are permitted to agree to customer service requirements . . ." and that individual municipalities may adopt their own customer service laws and regulations.[55] Congress has therefore made its prerogative known – local standards based on local experiences that are enforced by local officials are important tools for ensuring quality of service. The FCC cannot second guess Congress.[56]

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[52] *See, generally,* National Cable & Telecommunications Association, 2006 *Industry Overview* (2006), *available at* www.ncta.com.

[53] *See, e.g., People of the State of California v. FCC,* 905 F.2d 1217, 1230-31 (9th Cir. 1990) (agency decision must be overturned if the decision lacks record support).

[54] The FCC already considered and rejected any interpretation of § 632 which suggests that local customer service requirements must be generally applicable. *See Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992: Consumer Protection and Customer Service,* 8 FCC Rcd 2892,2896 (1993).

[55] *See, e.g.,* H.R. Rep. No. 102-628, 102nd Cong., 2d Sess. at 106 (1992) and H. Conf. Rep. No. 102-862, 102nd Cong., 2d Sess. at 78, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1261 (1992).

[56] *See, e.g., Louisiana Public Service Comm'n v. FCC,* 476 U.S. 355,375 (1986) (FCC cannot confer power upon itself impermissibly to effectuate what it believes is federal policy).

This should be self-evident because § 632 does not ascribe any role to the FCC in determining what types of local customer service requirements can or should be adopted. It is the responsibility of state and local governments to determine what local customer service laws and regulations should apply to cable operators under their jurisdiction?' The FCC's sole responsibility under § 632 was to adopt minimum customer service standards that can be enforced by local governments.[58]

G. Section 632 Does Not Limit Consumer Protection Authority to Particular Subjects.

According to Verizon, "cable customer service rules must be limited to the general types of things recognized in Section 632 to be customer service requirements."[59] Although not clear, it appears that Verizon is arguing that local consumer protection laws, standards and requirements must be confined to the subject areas delineated in § 632(b) of the Cable Act, 47 U.S.C. § 552(b). If this is the case, Verizon's construction of § 632 is not tenable. First of all, § 632(b) only applies to the Commission. Second, the subjects specified in § 632(b) are not exhaustive. In fact, the items listed are merely the "minimum" areas that must be dealt with in the FCC's rules – additional topics may also be addressed. Accordingly, § 632(b) cannot possibly function as a limit on local customer service requirements because there is no subject matter limitation in that provision

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[57] See Implementation of Section 8 of the Cable Television Consumer Protection and Competiiion Act of 1992: *Consumer* Protection and Customer Service, 8 FCC Rcd 2892,2895 (1993) ("[w]e conclude that the Commission is required to establish baseline customer service standards on which local governments may rely to ensure that the cable systems they regulate provide an adequate level of customer service. . . At the same time, Sections 632(a) and (c) [referring to what it now Section 632(d)] preserve the ability of local governments to exceed the FCC standards through the franchising or regulatory process when additional obligations are deemed necessary.").

[58] See 47 U.S.C. § 552(b).

[59] See the Verizon Comments at 5

In addition, neither § 632(a)(1) nor § 632(d) places any restrictions on the issues that may be addressed in local customer service laws, standards, regulations and requirements. This is because § 632 preserves local authority and flexibility to establish and enforce local customer service obligations.[60] The parameters of local authority are defined in state and/or local law – not in the Cable Act. As discussed above, the only authority Congress explicitly provided to the Commission in § 632 was to promulgate minimum customer service standards within 180 days of the enactment of the Cable Television Consumer Protection and Competition Act of 1992.[61] Accordingly, the FCC cannot arrogate to itself the power to prescribe or proscribe the subjects that local franchising authorities may address in consumer protection laws, regulations and requirements.

This conclusion is confirmed by the legislative history of the Cable Act, which states that:

> customer service means the direct business relation between an [sic] cable operator and a subscriber. Customer service requirements include requirements related to interruption of

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[60] ***See*** 47 U.S.C. §§ 552(a)(1) and 552(d)(1)-(d)(2). ***See also Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992: Consumer Protection and Customer*** Service, 8 FCC Rcd 2892,2897 (1993) ("Section 632(b), in delineating the FCC's involvement in establishing customer service standards, provides this Commission with no specific enforcement role . . . In addition, we believe that as a practical matter, customer service requirements can be enforced most efficiently and effectively on a local level where such enforcement historically has occurred."). ***Id.*** at 2897-98 ("specific customer service requirement enforcement mechanisms and processes are to be determined by the franchise authorities . . . Local governments should be free to avail themselves of reasonable remedies to assure compliance and fairness to all parties.") and 2893 ("Franchise authorities may agree with cable operators to adopt stricter standards and may enact any state or municipal law or regulation which imposes stricter or additional service standards to those set by the Commission.").

[61] ***See Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992: Consumer Protection and Customer*** Service, 7 FCC Rcd 8641, 8642 (1992) (stating that the Cable Television Consumer Protection and Competition Act of 1992 mandates that the FCC "establish standards that may be adopted and enforced by State and local governments but, following the historical pattern, providing the Commission no role in the enforcement of these standards.").

> service; disconnection; rebates and credits to consumers; deadlines to respond to consumer requests or complaints; the location of the cable operator's consumer service offices; and the provision to customers (or potential customers) of information on billing or services.[62]

It is therefore evident that, consistent with the plain language of § 632, Congress intended to recognize state and local jurisdiction over the entire cable operator-subscriber relationship. Consequently, local governments retain broad powers to address consumer protection issues, The list of topics delineated in the legislative history does not and cannot restrict the unambiguous reservation of authority in § 632(d)(2), which does not include any subject matter restrictions. Indeed, by using the word "include," Congress obviously meant to provide some specific examples of the matters that can be dealt with in local customer service requirements and standards, but not to define the universe of what is permissible.

III. APPLYING THE *REPORT AND ORDER* TO INCUMBENT CABLE OPERATORS IMMEDIATELY WOULD BE UNCONSTITUTIONAL.

Applying the *Report and Order* to incumbent cable operators immediately, as requested by the NCTA,[63] will trample **upon** the Constitutional rights of the LFAs. First, the effective elimination of public, educational and governmental ("PEG') funding by the Commission will result in an unconstitutional taking under the Fifth Amendment of the United States Constitution, based upon over one hundred years of judicial precedent. Second, the application the *Report and Order* to incumbent cable operators will violate the LFAs' and PEG users' First Amendment rights, because it will effectively eliminate previously bargained for funding that is required to enable the LFAs and the public to continue "speaking" over their cable systems.

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[62] H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. at 79, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4716 (1984).

[63] *See* the NCTA Comments at **7-19.**

A. Immediately Applying the *Report and Order to* Incumbent Cable Operators Will Constitute a Fifth Amendment Taking.

The use of a local government's public rights-of-way is the root benefit upon which the entire value of a cable franchise is built. The public rights-of-way are citizens' valuable and scarce public assets.[64] The LFAs therefore have a fiduciary duty to their citizens to properly manage and protect this valuable and scarce public asset. Without securing a cable franchise granting access to the public rights-of-way, the cost of acquiring the necessary easements to construct a cable system would have been prohibitively high. In return for the use of the public rights-of-way, cable operators have made commitments, financial and otherwise, to the LFAs, which are contained in their respective franchises and are reflected in their course of dealing.

Applying the *Report and Order* to incumbent cable operators immediately will result in a give-away of valuable public property and the taking of bargained for consideration for that valuable public property. Any direct or indirect attempt to preempt lawful compensation by reducing or eliminating bargained. for consideration for the use of public rights-of-way would be an unconstitutional taking under the Fifth Amendment of the United States Constitution. This principle goes back to the Telegraph Act of 1866. For example, in *Postal Tel. Cable Co. v. City of Newport*, the Kentucky Court of Appeals, citing several United States Supreme Court cases held:

> The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress ...conferred on the [telecommunications company] no right to use the streets and

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[64] *See* Valuation of the Public Rights-of-way Asset, TeleCommUnity Alliance, March 2002, *available at* http://www.telecommunityalliance.org/images/valuation2002.doc/*See also* Study of Utility Access to City-Owned Right-of-Way, Texas Municipal League, *reprinted in* NATOA Journal of Municipal Telecommunications Policy, Summer 2000, at 30.

alleys of the city…which belonged to the municipality.[65]

In the same vein, the United States Supreme Court has consistently held that local public rights-of-way cannot be given away to communications companies by the federal government without reasonable compensation for the use of local public rights-of-way.[66] For instance, in *St. Louis v. Western Union Tel. Co.*, the court rejected Western Union's claim that a municipality could not impose a pale charge on its use of the local rights-of-way, in light of the Telegraph Act of 1866,[67] which granted rights to telegraph companies to use federal post roads for interstate telegraph operations and prohibited states and local governments from interfering with those operations.[68] In so doing, the Court held that the 1866 Telegraph Act did not grant an unrestricted right to appropriate the public property of a state.[69] Accordingly, the federal government did not have the power to "dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are public property of the state."[70]

In *Western Union Tel. Co. v. City of Richmond*, Justice Holmes held the Telegraph Act of 1866 was "only permissive, not a source of positive rights…. [The statute] gives the appellant [the telegraph company] no right to use the soil of the streets…."[71] Finally, in *Postal Tel.-Cable*

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[65] *See Postal Tel. Cable Co. v. City of Newport*, 76 S.W. 159, 160 (Ky. 1903) *(citing St. Louis v. Western Union Tel. Co.,* 148 U.S. 92 (1893); and *Postal Tel. Co.* v. *Baltimore,* 156 U.S. 210 (1895)). *See also* Clarence **A.** 'West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Rights-of-way*, 1 MICH. TELECOMM. & TECH L. REV. 29 (1995).
[66] *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).
[67] *Id.*
[68] 14 Stat. 221 (1866).
[69] *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 100 (1893).
[70] *Id.* at 100-01.
[71] 224 **U.S.** 160, 169 (1912).

Co. v. ***City Richmond,*** the last significant Supreme Court case addressing the Telegraph Act of 1866 and local authority to receive compensation, the Supreme Court succinctly held that "even interstate business must pay its way – in this case for its right-of-way and the expense incident to the use of it."[72]

This line of cases illustrates that there is over one hundred years of legal precedent holding that the federal government cannot take local public rights-of-way without just compensation and that communications companies must pay for their use of public property for private profit. Any attempt by the Commission to commandeer public property by restricting or preempting existing compensation for the use of public rights-of-way would not only be unlawful under the Communications Act of 1934, it would also be an unconstitutional taking under the Fifth Amendment. Applying the ***Report and Order*** to incumbent cable operators will deprive the LFAs and other franchising authorities of lawful and reasonable compensation they negotiated with incumbent cable operators for the use of the public rights-of-way. Any such action by the FCC will be contrary to the Fifth Amendment.

When dealing with Constitutional concerns, like Fifth Amendment takings, a federal agency "must demonstrate that the recited harms are real, not merely conjectural . . ."[73] The Commission has not cited to any real harms for applying the ***Report and Order*** to incumbent operators. No finding has demonstrated a nationwide problem warranting federal intrusion into local rights-of-way management and compensation. Moreover, the FCC must interpret the Cable Act in a way that avoids the creation of Constitutional problems.[74] Accordingly, the ***Report and Order*** must not be applied to incumbents.

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[72] 249 U.S. 252,259 (1919).
[73] ***Turner*** Broadcasting System, *Inc. v.* FCC, 512 U.S. 622,664 (1994)
[74] ***See,*** *e.g., I.N.S. v. St. Cyr,* 533 U.S. 289, 299-300 (2001).

B. Immediately Applying the *Report and Order* to Incumbent Cable Operators will Violate the First Amendment.

Applying the *Report and Order* to incumbent cable operators immediately will violate the First Amendment rights of the LFAs, as cable programming producers, and public access program producers. Historically, PEG programming was facilitated and/or provided solely by the incumbent cable operator. Over time and through extensive negotiations, however, the responsibility for PEG programming shifted from incumbent cable operators to the LFAs. All of these negotiations were conducted under the prevailing understanding of the Communications Act of 1934, as amended. When programming responsibilities shifted, the parties voluntarily negotiated funding levels for the LFAs, and/or their designees, to enable them (and the general public) to produce and edit video programming. The funding was always expected to be excluded from the calculation of the franchise fee, and incumbent cable operators have never attempted to deduct the funding, from franchise fee payments. These funding provisions in existing franchise documents were not required by the LFAs, but were voluntarily negotiated because cable operators did not want the continued responsibility for programming PEG channels.

Congress expressly protects, these negotiated agreements between the **LFAs** and cable operators. In § 611(c) of the Cable Act, 47 U.S.C. § 531(c), Congress gave LFAs the authority to enforce agreements related to PEG use of channel capacity, "whether or not required by the franchising authority."[75] Applying the *Report and Order* to incumbent cable operators would be contrary to § 611(c) insofar as it would prevent the **LFAs** from fully enforcing the voluntary PEG commitments made by cable operators in their franchise agreements. In addition, it would significantly reduce PEG funding and correspondingly endanger PEG programming and PEG

[75] 47 U.S.C. § 531(c)

use of channel capacity in violation of the LFAs' and public access producers' First Amendment freedom of speech rights.

When LFAs are responsible for producing and cablecasting PEG programming, they are "cable programmers…entitled to the protection of the speech and press provisions of the First Amendment."[76] Moreover, a public access channel on a cable system is a public forum for First Amendment purposes.[77] The effect of applying the *Report and Order* to incumbent cable operators will cause the funding for PEG channels to decrease significantly or be eliminated, effectively wiping out the negotiated agreements between local franchising authorities and incumbent cable operators. This will essentially silence the LFAs' and other program producers' speech and either eliminate public fora or render them unusable – all in violation of the First Amendment rights of the LFAs and other users of PEG channels.

IV. THE FCC'S DISCUSSION OF MIXED-USE NETWORKS SHOULD NOT APPLY TO INCUMBENT CABLE OPERATORS AND SHOULD NOT BE CONSTRUED TO PREEMPT OR RESTRICT LOCAL GOVERNMENTS' POLICE POWERS, FRANCHISING AUTHORITY OR RIGHT OF WAY MANAGEMENT AUTHORITY

Both Verizon and the NCTA support the conclusions in the *Report and Order* concerning mixed-use networks?' The FCC has tentatively determined that these conclusions should apply to incumbent cable operators as they negotiate renewal franchises.[79] The LFAs believe this is unnecessary and inappropriate because the FCC's findings were predicated on its belief that local franchising authorities might apply their cable franchising and regulatory authority over

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[76] *See Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622,636 (1994); *FCC v. Time Warner Entertainment Co., LP v. FCC,* 93 F.3d 957 (D.C. Cir. 1996).
[77] *See Missouri Knights of the Ku Klux Klan v. Kansas City,* 723 F.Supp. 1347, 1351-52 (W.D. Mo. 1989).
[78] *See* the NCTA Comments at 19-20 and the Verizon Comments at 7.
[79] *See* the *FNPRM* at ¶ 140.

cable systems to networks that do not qualify as cable systems." Incumbent cable operators, however, are already operating cable systems and providing cable service, and are subject to local government jurisdiction and franchising authority under Title VI of the Communications Act of 1934 and applicable state and local laws and regulations. Accordingly, the FCC's concerns about inappropriate local regulation of mixed-use networks are inapposite to incumbent cable operators.

The **LFAs** also wish to address certain statements made by the FCC in its discussion of mixed-use networks that cable service providers and telecommunications service providers may rely upon or misconstrue to limit or ignore valid local franchising and public rights-of-way management authority. In ¶ 121 **of** the *Report and Order,* for example, the FCC concludes that "LFAs' jurisdiction applies only to the provision of cable services over cable systems." That is not true. Many local franchising authorities do have jurisdiction over providers of non-cable services under state law. In Minnesota, for example, local governments have the authority to require telecommunications service providers to obtain permits in order to use public rights-of-way and to pay for certain costs, among other things." Many local governments can also franchise providers of telecommunications service and require compensation from such providers for the use of public rights-of-way.

The *Report and Order* further states that "local regulations that attempt to regulate any non-cable services offered by video providers are preempted because such regulation is beyond the scope of local franchising authority . . ."[82] Unfortunately, this broad and ambiguous determination concerning the "regulation" of non-cable services could be interpreted by various

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[80] *See* the *Report and Order* at ¶ 121.
[81] *See, e.g.*, Minn. Stat. §§ 237.162 .and 237.163.
[82] *See Report and Order* at '$122.

service providers to argue that they do not have to comply with any local government laws and regulations applicable to non-cable services. Such an outcome would be very problematic because local governments have a legitimate interest in managing their public rights-of-way and protecting their citizens. In this regard, municipalities typically require non-cable service providers (i) to post bonds for damage to property and/or noncompliance with local codes, (ii) to provide maps showing the location of their facilities and equipment in public rights-of-way and (iii) to comply with local safety requirements. These powers are not rooted in Title VI of the Communications Act of 1934 or video franchising authority – they are a function of a municipal corporation's police and governmental powers under state law. The FCC has provided absolutely no legal justification and received no record evidence in this proceeding upon which it can preempt traditional sovereign powers reposed in state and local governments, such as local control over public rights-of-way and public property, and municipal police powers. The FCC should therefore clarify that the ***Report and Order*** does not preempt local governments' franchising authority, police powers and right-of-way management authority under state and local laws and regulations.

V. CONCLUSION.

For the foregoing reasons, the Commission cannot preempt or restrict local government customer service authority expressly preserved by § 632(d)(2) of the Cable Act. The FCC should also decline to apply the various findings and rules in the ***Report and Order*** to incumbent cable operators at any time, because the statutory and policy justifications for those findings are only applicable to new entrants, and any extension of the ***Report and Order*** to existing franchise agreements would violate the First Amendment and the Fifth Amendment. Finally, the FCC

should clarify that its discussion of mixed-use networks does not affect local government police powers, franchising authority and right-of-way management authority.

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The undersigned signatory has read the foregoing Reply Comments of the Burnsville/Eagan Telecommunications Commission; the City **of** Minneapolis, Minnesota; the North Metro Telecommunications Commission; the North Suburban Communications Commission; the City of Renton, Washington; and the South Washington County Telecommunications Commissiori and to the best of my knowledge, information and belief formed after reasonable inquiry, they are well grounded in fact and are warranted by existing law or a good faith argument for the ertension, modification or reversal of existing law; and are not interposed for any improper purpose.

Respectfully submitted,

Stephen J. Guzzetta
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Attorneys for the LFAs

May 4,2007

~~CER~~TIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Reply Comments of the Burnsville/Eagan Telecommunications Commission; the City of Minneapolis, Minnesota; the North Metro Telecommunications Commission; the North Suburban Communications Commission; the City of Renton, Washington; and the South Washington County Telecommunications Commission in Response to the Further Notice of Proposed Rulemaking to be mailed this 4th day of May, 2007, via overnight or first-class mail, postage prepaid, as indicated below, to the following persons:

Ms. Marlene H. Dortch*
Secretary
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, Maryland 20743

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445 12th Street, S.W.
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Ms. Holly Saurer**
Federal Communications Comimission
Media Bureau, Policy Division
445 12th Street, S.W.
Washington, DC 20554

Mr. Brendan Murray**
Federal Communications Commission
Media Bureau, Policy Division
445 12th Street, S.W.
Washington, DC 20554

* Via overnight mail
** Via first class mail

Brian F. Laule

St. Paul, Minnesota
May 4,2007